

EU POLLUTION SANCTIONS AND THE LAW OF THE SEA

On the legality of Directive 2005/35/EC

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1 Introduction

1.1 General Introduction

The criminalization of accidental pollution has its background in a proposal from the European Commission to establish a European fund to supplement the international regime for liability and compensation for oil pollution damage.

During the European Commissions Communication on the safety of seaborne oil trade of 21 March 2000 it was noted that the existing international liability and compensation regime for oil pollution had a number of shortcomings. The Commission addressed in particular the inadequacy of the limits for compensation as claims produced by recent incidents, most notably the Erika incident in December 1999, exceeded the maximum amount of compensation available from the 1992 Fund.¹⁻² Thus the Commission produced a proposal to establish a European fund³ supplementing the existing international regime. This fund would serve as a third tier and compensate victims that would be unable to obtain full compensation under the international regime.

The Commission also considered the threshold for the ship owner's right to limit their liability to be a major shortcoming.⁴ In order to break the ship owner's right to limitation it must be proven that the damage "resulted from his personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result."⁵ The Commission regarded the test of liability as unassailable and argued that the ship owner should face a greater exposure to unlimited liability due to "... the

¹ EC document, COM (2000) 142 final.

² 1992 Fund Convention.

³ EC document, COM (2000) 802 final.

⁴ Ibid. Pp. 53-59.

⁵ 1992 Civil Liability Convention art. V 2.

extraordinary risks involved in the transport of oil by sea ...”.⁶ The Commission therefore proposed to expose established grossly negligent behaviour by any person involved in the transport of oil at sea to both civil and criminal sanctions.⁷

These signals from the EC were discussed by the IOPC Funds⁸ which decided to raise the financial limits of the regime in 2000 by 50,73%⁹ and, in 2003, implemented a third tier of compensation¹⁰ bringing the financial limit approximately level with the proposed limit for the COPE fund. Thus the, in the Commissions view, most important shortcoming was accounted for. However, the 2000 amendments and Supplementary Fund do not address the issue concerning the standard of liability and the issue of criminalization.

Consequently the Commission presented a proposal for a directive on the protection of the environment through criminal law in order to introduce sanctions they considered adequate and sufficiently dissuasive.¹¹ In serious cases of pollution damage caused with intent or with serious negligence, the criminal sanctions could involve deprivation of liberty.¹² Being at EU-level this system would complement the international regime for civil liability and compensation for pollution damage.¹³

⁶ EU document, COM (2000) 802 final p. 56.

⁷ EU document, COM (2000) 142 final para. 5.d.iv) and COM (2000) 802 final p. 61. Article 10 of the COPE fund provided that the member states could impose penal sanctions on any person involved in oil transport by sea “...for established grossly negligent conduct.”

⁸ The International Oil Pollution Funds.

⁹ Resolution to amend the 1992 CLC; Resolution to amend the 1992 Fund Convention. See IOPC Funds document, 92FUND/A.5/INF.1 para 1 and 92FUND/A.5/INF.1 Annex I and II.

¹⁰ 2003 Supplementary Fund Protocol. See IOPC Funds document, 92/FUND/A.8/4 Annex I.

¹¹ EU document COM (2001) 139 final as modified by COM (2002) 544 final. See Justification, under the Explanatory Memorandum of the Proposal.

¹² EU document, COM (2001) 139 final p. 6 para (8).

¹³ EU document, COM (2003) 92 final.

In July 2005 the EU adopted a council framework decision¹⁴ for the implementation of the abovementioned directive,¹⁵ which was adopted in September 2005

The Directive caused much controversy, particularly within the shipping industry, and in 2006 a case regarding the Directive's validity was brought before the English High Court.¹⁶ Accordingly the claimants invited the English High Court to grant permission to apply for a judicial review of the Directive and refer several questions concerning its validity to the European Court of Justice. The claimants presented four arguments contending the Directive's invalidity of which all four was considered well-founded by the Court. Consequently the Court granted permission for a judicial review and referred the following questions to the ECJ (hereinafter the main questions).

(1) In relation to straits used for international navigation, the Exclusive Economic Zone or equivalent zone of a member state and the high seas, is article 5(2) of Directive 2005/35/EC invalid insofar as it limits the exceptions in Annex I regulation 11(b)¹⁷ of MARPOL 73/78 and in Annex II regulation (6) (b) of MARPOL 73/78 to the owners, masters and crew?

(2) In relation to the territorial sea of a member state:

¹⁴ Council Framework Decision 2005/667/JHA.

¹⁵ Directive 2005/35/EC.

¹⁶ High Court of Justice Queen's Bench Division Administrative Court, *International Association of Independent Tanker Owners (INTERTANKO), The International Association of Dry Cargo Shipowners (INTERCARGO), The Greek Shipping Co-operation Committee, Lloyd's Register, The International Salvage Union v. The Secretary of State for Transport*, Case No: CO/10651/2005.

¹⁷ In the revised annex I of MARPOL (IMO document MEPC 52/24/Add.2 containing the revised text of annex I of MARPOL (2004)) the enumeration of the regulations has changed (e.g. regulation 11 is now regulation 4). However, as both the *INTERTANKO and others v. The Secretary of State for Transport* case and Directive 2005/35/EC refers to the old annex I, the old annex I is referred to throughout this dissertation.

a) Is article 4 of the Directive invalid insofar as it requires member states to treat serious negligence as a test of liability for discharge of polluting substances; and/or

b) Is article 5 (1) of the Directive invalid insofar as it excludes the application of the exceptions in Annex I regulation 11 (b) of MARPOL 73/78 and in annex II regulation (6) (b) of MARPOL 73/78?

(3) Does article 4 of the Directive, requiring member states to adopt national legislation which includes serious negligence as a standard of liability and which penalizes discharges in the territorial sea, breach the right of innocent passage recognized by the United Nations Convention of the Law of the Sea, and if so, is article 4 invalid to that extent?

(4) Does the use of the phrase “serious negligence” in article 4 of the Directive infringe the principle of legal certainty, and if so, is article invalid to that extent?

1.2 Objectives and Structure

The objective of this dissertation is to examine the relationship between the Directive and international law without reference to EU law in particular. Thus main question 4 will not be examined and the Directive will, in most instances, be dealt with as if it was legislation adopted on the national level.

The starting point for the discussions in this paper is the main questions 1, 2, and 3 with reference to the claimant’s and Mensah’s arguments. All questions raise issues that neither INTERTANKO and others (hereinafter the claimants) nor Mensah deal with throughout their argumentation. Thus, the discussions depart from what seems to be the intended scope of the main questions. This was found necessary in order to cover as many aspects as

possible and to provide an, as complete as possible, examination of the Directive in relation to MARPOL and UNCLOS.

Section 2 provides an overview of UNCLOS, MARPOL, and the Directive, and deals with general issues that are common to the main questions. Therefore, the issues discussed in these sections will be dealt with without reference to any of the main questions in particular.

Main question 1 is examined in section 3. In subsection 3.1 three issues common to main question 1 are examined while subsections 3.2.1 and 3.2.2 deal with prescriptive and enforcement jurisdiction with respect to straits and the EEZ. The distinction between prescriptive and enforcement jurisdiction is not upheld with respect to the high seas as these topics are interrelated to a larger extent than with respect to straits and the EEZ.

Section 4.1 deals with main question 3. The foremost question raised here is whether the article 4 of the Directive raises the question of innocent passage. This is first examined in general then in relation to prescriptive and enforcement jurisdiction in subsections 4.1.2 and 4.1.3

Section 4.2 deals with main question 2 which is divided into sub-questions 2 (a) and 2 (b). These questions require additional clarification the distinction between them is therefore examined in subsection 4.2.1. The enforcement issues raised in relation to questions 2 (a) and 2 (b) are dealt with in under question 2 (a), while issues regarding prescriptive jurisdiction is covered in subsections 4.3 and 4.4.

1.3 Methodology

1.3.1 The relevant sources of international law and their application in relation to the dissertation

Article 38 of the Statute of the International Court of Justice is widely recognized as an authoritative statement of relevant sources of international law, although not representing an exhaustive list of sources.¹⁸ According to article 38 the primary sources are international conventions, international custom and general principles of law,¹⁹ while “... judicial decisions and the teachings of the most highly qualified publicists of the various nations [serve as] subsidiary means for the determination of rules of law.”²⁰

As most issues examined in this dissertation are regulated by provisions in either MARPOL or UNCLOS or both, these conventions serve as the main sources of international law. Considering that UNCLOS codifies and represents much of the international customary law in respect of the law of the sea,²¹ international custom is not as important to the topics of this paper as it is to other fields of international law. This is also the case regarding judicial decisions as judgements by international courts concerning marine pollution by ships are sparse and none of the ICJ and ITLOS²² decisions has had any direct bearing on the examination of the main issues of this paper. On the other hand are the ‘teachings of publicists’ important to the arguments presented in this dissertation, both due to the lack of other sources and the number of such writings covering a broad range of issues. However, accounting for article 38 (1) (d) of the ICJ Statute, the subsidiary nature of this source

¹⁸ Brownlie (2003) p. 5; Ruud, Ulfstein and Fauchald (1997) p. 16.

¹⁹ The ICJ Statutes art. 38 (1) (a), (b) and (c).

²⁰ Ibid. (d).

²¹ See Churchill and Lowe (1999) p. 9.

²² Only 13 cases have been before the ITLOS and 7 of these are prompt release cases. See http://www.itlos.org/start2_en.html

makes a conclusion uncertain if based on arguments derived from writings alone. Considering the scarcity of the other sources, the writings of publicists will serve as an important source of international law, but predominantly as a factor for the interpretation of the primary sources.

1.3.2 Interpretation of MARPOL and UNCLOS

According to the Vienna Convention article 31 the focal point of all treaty interpretation is the terms of the treaty within their ordinary meaning²³ and “... in their context and in the light of its object and purpose.”²⁴ Article 32 stipulates that recourse may be had to, *inter alia*, preparatory works as a supplementary means of interpretation in order to “... confirm the meaning resulting from the application of Article 31 ...” or when the interpretation according to article 31 either “... (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. However, due to the supplementary nature of article 32 and the focus on ‘fidelity to the text’ in article 31 a teleological approach is probably undue, at least in respect of MARPOL and UNCLOS.”²⁵ This is in line with the view that the intentions of the parties shall be accounted for, not as an independent basis of interpretation, but as expressed in the text.²⁶

²³ As the ordinary meaning is to be given to the terms the intentions of the authors are accounted for as expressed in the text, and not as an independent basis of interpretation. See Brownlie (2003) p. 602; Noyes (2002) p. 368.

²⁴ Vienna Convention 1969 art. 31 (1).

²⁵ Noyes (2002) p. 370; Brownlie, (2003) p. 607, argues, in respect of treaty interpretation in general, that “... the teleological approach, with its aspect of judicial legislation, may be thought to have a constructive role to play” in certain situations. Ruud, Ulfstein and Fauchald, (1997) p. 57, submit that, according to articles 31 and 32 of the Vienna Convention, the objective, subjective, and teleological approach are equally important.

²⁶ According to Brownlie, (2003) p. 602, this view was taken by the Institute of International Law, the International Law Commission and the ICJ before being codified by the Vienna Convention.

Article 31 (3) (b) of the Vienna Convention 1969 indicates that state practise can be a relevant factor in the interpretation of treaties.²⁷ Individual state practise is referred to where such practise is found to shed light over the discussed issue and/or an unclear treaty provision. In addition some arguments are supported on the preparatory works of MARPOL in order to clarify certain ambiguities. However, recourse to the preparatory works will be limited as they are considered to be supplementary to the text and should only be used as a factor for interpreting under certain circumstances.²⁸

2 Legal context

There are several issues concerning UNCLOS, MARPOL, and the Directive that are common to main questions 1, 2, and 3. These issues will be dealt with in the following in order to establish a foundation for the further examination of main questions 1, 2, and 3 and to avoid repetition.

2.1 General remarks concerning UNCLOS and the jurisdiction of states over vessel-source pollution

Part XII of UNCLOS lays down a general and comprehensive legal framework for the “Protection and Preservation of the Marine Environment”²⁹ as it applies throughout the marine environment and covers all sources of pollution.³⁰ Accordingly, the provisions dealing with vessel-source pollution are mainly found in part XII and to a lesser extent in

²⁷ See also Ruud, Ulfstein and Fauchald, (1997) p. 30.

²⁸ The Vienna Convention 1969 art. 32.

²⁹ The title of part XII. See Kwiatkowska (1989) p. 160.

³⁰ Kwiatkowska (1989) p. 160; Molenaar (1998) p. 51.

parts II-VII dealing specifically with the different maritime zones.³¹ In general these rules provide that, with respect to foreign ships in transit through the maritime zones, states may exercise limited prescriptive and enforcement jurisdiction that increases “... in proportion to the geographical proximity of the zone in question to the coastal state.”³²

Ships navigating the high seas are subject to the exclusive jurisdiction of the flag state save in “... exceptional cases expressly provided for in international treaties or in [UNCLOS]...”.³³ Even though the flag state enjoys exclusive jurisdiction on the high seas all ships are required by articles 94 (5) and 211 (2) to comply with generally accepted rules and standards (hereinafter GAIRS).

With respect to the exclusive economic zone (hereinafter EEZ) coastal state prescriptive jurisdiction is limited to conforming and giving effect to GAIRS.³⁴ Coastal enforcement jurisdiction in the EEZ is limited by UNCLOS article 220 (3, 5, and 6) depending on various criteria concerning the magnitude of the damage and level of obtained evidence.

In international straits the strait state has the competence to prescribe navigational measures³⁵ and to “... adopt laws and regulations relating to transit passage [...] by giving effect to applicable international regulations.”³⁶ The only provision that deals specifically with strait state enforcement jurisdiction is UNCLOS article 233. According to article 233 the strait state is allowed to take ‘appropriate measures’ if a foreign ship has violated “... the laws and regulations referred to in article 42 [(1) (a and b)], causing or threatening major damage to the marine environment of the straits ...”.³⁷

³¹ The contiguous zone will not be dealt with as the Directive does not address this zone.

³² Ringbom (2006) p. 206.

³³ UNCLOS art. 92 (1). As examined in subsection 3.3, article 218 of UNCLOS represents the only exception relevant to this paper.

³⁴ UNCLOS art. 211 (5).

³⁵ UNCLOS art. 42 (1) (a).

³⁶ UNCLOS art 42 (1) and (1) (b).

³⁷ UNCLOS art. 233.

The overall premise of the territorial sea is that the sovereignty of a coastal state extends to the territorial sea.³⁸ However, coastal state prescriptive jurisdiction is limited to give effect to GAIRS with respect to “... design, construction, manning or equipment of foreign ships ...”³⁹ (hereinafter CDEM). In the territorial sea coastal state enforcement jurisdiction is limited by the regime of innocent passage. With respect to ships in innocent passage enforcement jurisdiction is limited by UNCLOS article 220 (2, 3, 5, and 6), while with respect to ships in non-innocent passage the coastal state enjoys complete jurisdiction.⁴⁰ In addition the obligation not to discriminate and not to hamper innocent passage laid down in article 24 applies to both prescriptive and enforcement jurisdiction.⁴¹

Within the internal waters the state has full jurisdiction which implies a right to set conditions for access to its ports and may require compliance with its requirements.⁴² However, restrictions to state jurisdiction within the internal waters follow “...from principles of general international, such as the prohibition of discrimination or of abuse of right,”⁴³ and restrictions may follow from treaty commitments and proportionality requirements.⁴⁴

³⁸ UNCLOS art. 2.

³⁹ UNCLOS art 21 (2).

⁴⁰ Ringbom (2006) pp. 207-208.

⁴¹ Hakapää (1981) pp. 190 and 196; Molenaar (1998) p. 201. Article 211 (4) reaffirms the obligation not to hamper innocent passage with respect to prescriptive jurisdiction. See subsections 4.1.2 and 4.1.3.

⁴² UNCLOS arts. 25 (2) and 211 (3). Ringbom (2006) p. 208. See also Hakapää (1981) p. 169; Molenaar (1998) pp. 185-186.

⁴³ Ringbom (2006) p. 208.

⁴⁴ Ibid.

2.2 On MARPOL and the jurisdictional interplay between MARPOL and UNCLOS

There are several issues concerning MARPOL and the jurisdictional interplay between MARPOL and UNCLOS that are common to both questions 1 and 2 and have a bearing on question 3. These issues will be dealt with under the *chapeau* ‘the issue of residual jurisdiction.’

2.2.1 The issue of residual jurisdiction

The question raised here is whether state parties to MARPOL are left with a margin of discretion in exercising jurisdiction under MARPOL and, if so, the extent of residual jurisdiction.⁴⁵ This is necessary to examine as the claimants have to a certain degree built their case on the assumption that MARPOL sets a fixed and binding set of rules that national legislation can not depart from.⁴⁶

First it should be mentioned that regulatory conventions such as MARPOL are first and foremost concerned with technical rather than jurisdictional issues. This common feature is probably due to the uncertainty⁴⁷ concerning coastal state jurisdiction at the time the major regulatory conventions were adopted.⁴⁸ Nevertheless, MARPOL contains provisions which deal with jurisdictional aspects.

Article 4 (2) of MARPOL requires coastal states to prohibit any violation of the Convention within its jurisdiction, which includes an obligation to prohibit any violation of the rules and standards laid down in the annexes to MARPOL as they are binding in their

⁴⁵ See Molenaar (1997) p. 202.

⁴⁶ INTERTANKO and others v. The Secretary of State for Transport paras. 29-35.

⁴⁷ This is elaborated below.

⁴⁸ E.g. MARPOL and SOLAS. See Timagenis (1980) p. 486; Molenaar (1997) p. 202.

entirety.⁴⁹ The mandatory nature of the phrase ‘to prohibit any violation of the Convention’ implies both a minimum and maximum level of prescriptive jurisdiction and under the assumption that the standards in MARPOL represent the maximum level of coastal state prescriptive jurisdiction one can hardly argue that the coastal state retains residual jurisdiction.⁵⁰ Accordingly Molenaar upholds that article 4 (2) does not provide a basis for unilateral prescriptive jurisdiction, a conclusion in concurrence with the claimant’s and Mensah’s view.⁵¹ Notwithstanding this, Boyle asserts that article 4(2) of MARPOL does not debar coastal states from adopting stricter standards⁵² as the coastal state “... enjoys a substantial measure of national discretion.”⁵³ In order to agree with Boyle’s conclusion one must examine article 4 (2) in a broader context.

The relationship between MARPOL and UNCLOS provides guidance regarding the extent of coastal state jurisdiction and MARPOL. One could argue that principles such as the *pacta sunt servanda* principle⁵⁴ and article 311 (2) of UNCLOS implies that UNCLOS cannot influence the rights and obligations of MARPOL, thus the coastal state retains no residual jurisdiction. The *pacta sunt servanda* principle requires the State parties to MARPOL to perform the Convention as agreed between the parties,⁵⁵ and article 311 (2) provides that UNCLOS “... shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the

⁴⁹ MARPOL, art. 14 (1).

⁵⁰ Molenaar (1997) p. 203.

⁵¹ Molenaar (1998) p. 210; Neither the claimants in the *INTERTANKO and others v. The Secretary of State for Transport*, nor Mensah, use the terms ‘maximum/minimum’ levels of coastal state jurisdiction. The claimants, para 35, consider MARPOL to provide “... a fixed, binding and uniform set of rules which cannot be departed from save by amendment of MARPOL [.]” while Mensah, (2005) p. 27, argues that “... there is no basis either in MARPOL or in UNCLOS for the claim that a coastal state has the power to enact laws that deviate from the parameters specified under international law.”

⁵² Boyle (1985) p. 359 n. 71.

⁵³ Boyle (2006) p. 25.

⁵⁴ Vienna Convention on the Law of Treaties, art 26.

⁵⁵ *Ibid.*

enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”⁵⁶ Furthermore, as mentioned, the claimants in the *INTERTANKO and others v. The Secretary of State for Transport* case, argue that national legislation cannot deviate from MARPOL rules as they constitute a “... fixed, binding and uniform set of rules.”⁵⁷ Supporting this argument the claimants underline that the recitals of MARPOL provide that the rules established by MARPOL are meant to have a universal purport.⁵⁸ These arguments suggest that a coastal state does not retain any residual jurisdiction and therefore cannot depart from the set of rules laid down in MARPOL. Nevertheless, the drafting history and the text of MARPOL itself clearly indicate that UNCLOS was intended to be, and is, instrumental to the interpretation of MARPOL provisions.⁵⁹

During the 1973 Conference, which adopted MARPOL 73, there was much controversy concerning the question of jurisdiction⁶⁰ and the conference considered proposals in relation to both prescriptive -and enforcement jurisdiction, but it proved difficult to attain a general consensus on either issue.⁶¹ The proposal on prescriptive jurisdiction⁶² failed to

⁵⁶ UNCLOS, art 311 (2). See also Ringbom (1996) pp. 76-77.

⁵⁷ *INTERTANKO and others v. The Secretary of State for Transport*, para 35.

⁵⁸ *INTERTANKO and others v. The Secretary of State for Transport*, para. 36.

⁵⁹ Mensah, (2005) p. 27, recognizes this in the paper on which the claimants in the *INTERTANKO and others v. The Secretary of State for Transport* case rely, underlining that UNCLOS contains the overarching principles in which the provisions of the MARPOL 73/78 Convention are subject to. In addition he contends that UNCLOS provides general powers and rights that MARPOL 73/78 specifies within the framework provided by UNCLOS, but that the prescriptive jurisdiction conferred by MARPOL is subject to limitations in both the convention itself, and the over arching principles of UNCLOS.

⁶⁰ According to M’Gonigle and Zacher, (1979) p. 200, the development of the discussion on jurisdictional matters threatened to deprive flag states of the “... almost exclusive jurisdiction both to legislate standards that apply to their ships and to enforce these standards.”

⁶¹ Abecassis and Jarashow, (1985) pp. 92-93, observe that “... the question of jurisdiction was a key item on the agenda, and was keenly fought. M’Gonigle and Zacher, (1979) p. 206, goes further when stating that “... the success of the entire 1973 Conference hinged on the resolution of crucial jurisdictional issues.” See also Timagenis (1980) pp. 509-522.

obtain sufficient support in the Plenary and the draft article on prescriptive jurisdiction was subsequently deleted.⁶³ On the issue of enforcement jurisdiction a compromise position was reached in regard of the Administration,⁶⁴ port states⁶⁵ and coastal states.⁶⁶ In respect of coastal state enforcement jurisdiction the final compromise reached at the 1973 conference is laid down in the above-mentioned article 4 (2) and article 9. The latter provides that:

“(2) Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

(3) The term ‘jurisdiction’ in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention.”

⁶² Pursuant to the proposed article 8, IMCO Doc. MP/CONF/C.1/WP.36, any contracting state could adopt more stringent measures in respect of discharge standards but not in respect of CDEM standards. According to M’Gonigle and Zacher, (1979) p. 209, the proposed article 8 was accepted in the 1973 session of the U.N. Seabed Committee and was subsequently incorporated in the draft text presented to the plenary at the 1973 Conference where it was deleted. Nevertheless this shows that the drafters of MARPOL did not intend MARPOL rules to be uniform. See also Timagenis (1980) pp. 488-494.

⁶³ M’Gonigle and Zacher (1979) p. 218; Timagenis (1980) p. 501; Abecassis and Jarashow, (1985) pp. 92-93.

⁶⁴ Timagenis (1980) pp. 509-510. The Administration refers to the flag state for ships and coastal state for platforms in most cases. This issue was the least controversial of the jurisdictional issues according to Timagenis, p 509.

⁶⁵ Ibid. pp. 510-515.

⁶⁶ Ibid. pp. 515-522. At p. 515 Timagenis underlines that, although coastal state enforcement jurisdiction by itself was undisputed, its nature and extent was “... one of the most controversial questions negotiated in the 1973 Conference.”

In addition to article 9 (2) and (3) the 1973 Conference adopted a resolution which stated that:

“... the appropriate forum to deal with the question of the nature and extent of states’ over the sea is the [...] Conference on the law of the sea,” that; the 1973 conference had “... a clear intention to leave that question to the [...] Conference on the law of the sea,” and finally that; “... the rights exercised by a State within its jurisdiction in accordance with the Convention do not preclude the existence of other rights of that State under international law.”⁶⁷

The articles 4 and 9, resolution 23, and the drafting history of MARPOL show that jurisdictional matters was to a large extent undecided and left to the UNCLOS III Conference and general international law. This clarifies the question of residual prescriptive- and enforcement jurisdiction as MARPOL gives priority to general international law and UNCLOS, thus relying on jurisdictional matters to be dealt with under those instruments rather than under MARPOL.⁶⁸

Based on this examination one is presented with the conclusion that the arguments suggesting that the coastal state does not retain any residual jurisdiction seem weak. First, the *pacta sunt servanda* principle and UNCLOS article 311 (2) cannot be interpreted as to exclude residual jurisdiction, due to MARPOL giving priority to general international law and UNCLOS when there are uncertainties in respect of a jurisdictional dimension of MARPOL. Second, the argument that MARPOL lays down a uniform set of rules that cannot be departed from implies that there has been struck a reciprocal ‘package deal’ between flag states and coastal states thereby excluding residual prescriptive jurisdiction

⁶⁷ IMCO Sales No. 74.01.E p. 147. The International Conference on Marine Pollution 1973, Resolution 23 “Nature and Extent of States’ Rights over the Sea” referred in Timagenis (1980) p. 487.

⁶⁸ See Molenaar (1998) p. 111.

voluntarily.⁶⁹ This is quite clearly not the case as article 9 (2) and resolution 23 leaves such issues to general international law and UNCLOS.

Third, even though the rules of MARPOL are intended to have a universal purport, one cannot disregard the fact that jurisdictional issues shall be dealt with within the framework of general international law and UNCLOS, thus in some cases allowing coastal states to depart from the rules set out in MARPOL.⁷⁰

Based on the above it seems justified to conclude that coastal states retain residual jurisdiction under MARPOL where general international law, including UNCLOS, allows the setting of standards that go beyond the standards of MARPOL.⁷¹

⁶⁹ Molenaar (1998) p. 111. According to Timagenis, (1980) p. 503, the Australian delegation at the 1973 conference submitted, in IMCO document MP/CONF/WP.31, that it seems illogical to accept that "... a minority of delegations, by voting to upset a compromise text, could impose on a majority of delegations a positive obligation which the majority has made it clear that it will not accept."

⁷⁰ However, the coastal state does not retain unlimited jurisdiction. There are clear limits within the framework of UNCLOS, for example GAIRS, and according to Molenaar, (1998) pp. 115-117, a unilateral approach has to respect principles such as non-discrimination and national treatment. In addition Molenaar, p. 115, observes that, while not belonging to the domain of law, "... socio-economic and political interests or international comity require [...] the balancing of interests of all actors involved."

⁷¹ Timagenis (1980) pp. 488-506; Abecassis and Jarashow, (1985) p. 93; Molenaar (1997) p. 204; Molenaar (1998) pp. 111-112 and 211. Commenting on "... the question whether MARPOL discharge restrictions constitute *obligations* for the coastal state ..." Ringbom, (1996) p. 77, argues that "... it would seem that the matter is of a purely jurisdictional nature, that is, if there is an obligation for coastal States not to exceed the MARPOL standards, this is an obligation which arises from the jurisdictional framework in UNCLOS rather than from MARPOL."

2.3 General remarks concerning the Directive

First it should be underlined that the Directive applies to any ship⁷² irrespective of its flag, thus binding its member states whether acting in the capacity of flag state or coastal state.⁷³ This is an important observation that is common for all the main questions. The Directive is first and foremost problematic in that it is applicable to ships flying the flags of non-parties to the Directive. Therefore the examinations below are undertaken with the conflict between a member-coastal state and a ship flying the flag of a non-member of the Directive in mind. The other aspect of the phrase ‘irrespective of its flag’ is that the Directive is applicable in relation to ships not flying the flag of states non-parties to the Directive and even states non-parties to MARPOL and UNCLOS.

The MARPOL convention recognizes three situations where the discharge standards shall not apply. The annexes to MARPOL provide that the discharge standards shall not apply when the discharge was “... necessary for the purpose of securing the safety of a ship or saving life at sea.”⁷⁴ Nor shall the standards apply to “... the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment.”⁷⁵ The third situation is where there is a discharge “... for the purpose of combating specific pollution incidents in order to minimize the damage from pollution.”⁷⁶ The Directive recognizes the first and third exception fully,⁷⁷ but the second situation, which is laid down in the ‘damage

⁷² According to article 3 (2) of the Directive the following ships are excluded: “... any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.”

⁷³ Directive 2005/35/EC, art. 3 (2).

⁷⁴ MARPOL regs. I/11 (a), II/6 (a), III/7 (a), IV/9 (a), V/6 (a) and VI/3 (a).

⁷⁵ MARPOL regs. I/11 (b), II/6 (b), IV/9 (b), V/6 (b) and VI/3 (b).

⁷⁶ MARPOL regs. I/11 (c) and II/6 (c).

⁷⁷ Directive 2005/35/EC art. 5 (1).

exception’⁷⁸ in MARPOL, is excluded from article 5 (1) of the Directive, thus excluding this exception from discharges into the internal waters or territorial sea of a member State.

Article 5 (2) of the Directive, which deals with discharges into straits used for international navigation, the EEZ and the high seas, takes ‘damage exception’ into account. Article 5 (2) states that a discharge into any of these areas “... shall not be regarded as an infringement for the owner, the master or the crew when acting under the master’s responsibility if it satisfies the conditions set out in ...” regulations I/11 (b) and II/6 (b) of MARPOL.⁷⁹ The respective conditions are that the discharge is a result from damage to the ship or its equipment,⁸⁰ that “... all reasonable precautions have been taken after the occurrence or discovery of the discharge for the purpose of preventing or minimizing the discharge;”⁸¹ and except if the owner or Master acted either with intent to cause damage or recklessly and with knowledge that damage would probably result.”⁸² By excluding other persons than the owner, the master or the crew the Directive provides that other persons are liable according to article 4 while the mentioned persons are not liable if the conditions of the exceptions of MARPOL are met.

Main questions 1, 2 (a), 2 (b), and 3 deal with this alleged discrepancy between the Directive and MARPOL. Question 1 deals with this in relation to article 5 (2) of the Directive which limits the exceptions in regulations I/11 (b) and II/6 (b) to the owners, masters and crew acting under the master’s responsibility. In question 2 (a) the claimants question the validity of article 4 of the Directive arguing that it opts for a different test of liability than regulations MARPOL’s ‘damage exception’, and question 2 (b) deals with

⁷⁸ Note that this exception is laid down in annexes IV-VI as well, but only annexes I and II are relevant to the Directive.

⁷⁹ Directive 2005/35/EC art. 5 (2).

⁸⁰ MARPOL regs. I/11 (b), II/6 (b). See also IV/9 (b), V/6 (b) and VI/3 (b).

⁸¹ MARPOL regs. I/11 (b) (i), II/6 (b) (i).

⁸² MARPOL regs. I/11 (b) (ii), II/6 (b) (ii).

article 5 (1) as it excludes the ‘damage exception.’⁸³ This discrepancy between the Directive and MARPOL is also relevant to the third question in that it seems to serve as a precondition for questioning article 4’s validity in light of the regime of innocent passage.

3 Examination of main question 1

This question raises three issues which need preliminary mentioning. All three issues are to some extent common to the examinations in subsections 3.2 and 3.3.

3.1 Issues common to main question 1

The starting point for this question in relation to straits, the EEZ, and the high seas is whether the Directive can lawfully deviate from MARPOL. This has been dealt with under subsection 2.2.1, which concluded that the coastal state may adopt legislation departing from the rules laid down in MARPOL as long as the coastal state legislation is in conformity with the relevant provisions of UNCLOS. Thus, the remaining question, which will be examined in relation to straits, the EEZ and the high seas in subsections 3.2 and 3.3, is whether the Directive is consistent with UNCLOS.

3.1.1 Does article 5 (2) of the Directive represent a deviation from MARPOL?

The first issue is whether or not the exclusion of some persons to the MARPOL exceptions in article 5 (2) of the Directive represents an actual deviation from MARPOL. As mentioned above, article 5 (2) of the Directive provides that a discharge into straits, the EEZ or the high seas shall not be treated as an infringement for the master, owner, and crew when the conditions set out in the ‘damage exception’ in MARPOL are satisfied. As

⁸³ The distinction between question (2) a and (2) b is examined in subsection 4.2.1.

any person can be penalized for an infringement⁸⁴ the exclusion of the owner, master, and crew in article 5 (2) means that, in respect of discharges into straits used for international navigation, the EEZ or the high seas, penalties are applicable to all others than the owner, master, and crew if the conditions of the MARPOL exceptions are satisfied, and that any person including the owner, master, and crew are susceptible to penalties if the conditions are not satisfied. INTERTANKO and others claim that article 5 (2) of the Directive is invalid as

“[a] person associated with ships other than the owner, master and crew would normally be able to take advantage of these regulations [(the ‘damage exception’ in MARPOL)] but loses this right under the Directive on both the high seas and in the EEZ. The claimants assert that the Community has no jurisdiction to provide that discharges from 3rd country ships caused by serious negligence on the part of a person other than owner, master or crew acting under his responsibility (and not falling within article 5(1) of the Directive) are to be infringements and subject to penalties.”⁸⁵

The ‘damage exception’ in MARPOL provides that a discharge that otherwise would be considered a violation shall be excepted if the discharge resulted from damage to the ship or its equipment and all reasonable precautions have been taken unless the master or owner acted with intent or recklessly with knowledge that damage would probably result. The wording of these regulations suggests that the conduct of the owner and/or master is mentioned only as conditions which must be met in order to except an otherwise qualified violation of MARPOL, and not as a statement of which persons are susceptible to penalties.⁸⁶ On the other hand, as the exceptions in annex I and II are general exceptions

⁸⁴ Directive 2005/35/EC art. 8 (2).

⁸⁵ INTERTANKO and others v. The State Secretary for Transport para. 32.

⁸⁶ This view seems to be in line with that of Timagenis (1980) pp. 454-455. Upon examining the ‘damage exception’ Timagenis, (1980) p. 454, argues that the requirements concerning the owner or master are established by the ‘damage exception’ since “... this exception relates to unintentional discharges which

from MARPOL violations, one could argue that all the persons that can be held liable should also benefit from the exceptions. Nevertheless, when giving effect to and applying MARPOL, the coastal state must determine which persons can be made subject to criminal sanctions in order to enforce MARPOL. Otherwise the obligation to prohibit violations and establish sanctions under MARPOL would be undermined,⁸⁷ and the MARPOL Convention would not be applied successfully. Accordingly, the Directive seems to fill a regulatory gap in MARPOL and exclusion of certain persons in article 5 (2) should be considered as a consequence of this and not as unlawful unilateralism.

3.1.2 Does article 4 of the Directive represent a deviation from MARPOL?

The second issue deals with whether or not the ‘damage exception’ in MARPOL sets a standard of liability that must be met in order for the offender to be susceptible to penalties for accidental MARPOL violations.⁸⁸ Mensah argues that article 4 of the Directive is inconsistent with MARPOL as it criminalizes serious negligence while MARPOL sets the threshold at recklessness.⁸⁹ If taken out of context the standard of liability in article 4 is clearly stricter than the alleged standard in MARPOL. However, the ‘damage exception’ in MARPOL only operates with a qualification of the owner and/or masters conduct as a requirement for the discharge to be regarded as a violation. Furthermore, any states conforming to and giving effect to MARPOL must decide upon what requirement of guilt to adopt in order to apply MARPOL successfully and comply with the obligation to prohibit MARPOL violations.⁹⁰ State practice also supports this as several states have

could not be prevented.” Furthermore he underlines that the ‘damage exception’ is “... based on the impossibility of the Master and/or Owner preventing the discharge” and does not imply that these regulations state which persons are applicable to penalties. This is also in line with Mensah’s, (2005) p. 26, view.

⁸⁷ MARPOL art. 4.

⁸⁸ This issue is relevant to main question 1 in this section and main question 2 in section 4.2.

⁸⁹ Mensah (2006) p 27.

⁹⁰ MARPOL art. 4.

adopted a regulatory system imposing criminal sanctions against MARPOL violations committed with negligence.⁹¹

Thus, the ‘damage exception’ seems to have no impact on the adoption of a requirement of guilt in national legislation and does not set a standard that has to be met in order for a person to be susceptible to penalties.⁹² Based on this it seems correct that GAIRS do not with the adoption of a standard of liability and the adoption of such a standard is a necessity in order to conform and give effect to GAIRS. Therefore it seems unlikely that the standard of liability adopted by the Directive is unlawful.

3.1.3 Enforcement issues with respect the Directive, framework decision and UNCLOS

The third issue deals with the enforcement of the Directive and its reference to Framework Decision 2005/667/JHA.⁹³ The framework decision provides that the criminal penalties against natural persons⁹⁴ “... shall include, at least for serious cases, criminal penalties of a maximum of at least between one and three years of imprisonment”⁹⁵ other than in minor cases subject to article 4 (2). Intentional violations shall be punishable by a maximum of at least five to ten years of imprisonment for offences with the most serious consequences,

⁹¹ E.g. Denmark has criminalized gross negligence, Gold (2006) p. 291; Canada has adopted enactments that impose custodial sentences for accidental pollution, Gold (2006) pp. 282-285; Several states in the USA has criminalized various types of negligence, Gold (2006) pp. 369-381.

⁹² See subsections 3.1.1 and 3.1.2.

⁹³ See the preamble paragraph 6 and article 4.

⁹⁴ Except for the owner, master or the crew in cases of pollution offences committed in international straits, the EEZ, and high seas when the conditions set out in MARPOL’s ‘damage exception’ are met (article 5 (2) of the Directive). Article 2 (2) of the framework decision reaffirms this in respect of the crew, however, without the specification ‘when acting under the master’s responsibility.’

⁹⁵ Council Framework Decision 2005/667/JHA art. 4 (1).

including the death or serious injury of persons,⁹⁶ and by a maximum of at least two to five years for offences with the less serious consequences listed in article 5. For violations committed with serious negligence the custodial penalty can amount to a maximum of at least two to five years for offences having the consequences described by article 3 (6) and to a maximum of at least one to three years if having the consequences described in article 3 (7).⁹⁷

This is problematic as UNCLOS article 230 (2) provides that other than monetary penalties only may be imposed in respect of acts of wilful and serious pollution to the territorial sea. Even though it is generally agreed that the non-monetary penalties may include imprisonment,⁹⁸ the phrase ‘the territorial sea’ indicates that the coastal state is debarred from imposing non-monetary penalties for violations in the maritime zones seaward of the territorial sea.⁹⁹ On the other hand article 4 (8) of the framework decision expressly states that article 4 shall apply without prejudice to article 230 of UNCLOS with respect to custodial sentences and the discrepancy between article 4 and article 230 is unintended. Consequently, one should interpret article 4 narrowly in this regard and as only requiring the imposition of custodial sentences for offences committed in the territorial sea.

⁹⁶ Ibid. Art. 3 (4).

⁹⁷ The framework decision does not specifically mention reckless behaviour, but it appears reasonable to assume that the provisions dealing with serious negligence also applies to recklessness.

⁹⁸ Molenaar (1998) p. 465; Gold (2003) p. 5.

⁹⁹ Molenaar (1998) p. 465. Nevertheless there are examples of national legislation operating with custodial sentences against acts of pollution that does not meet the criterion ‘wilful and serious.’ According to Gold (2006) Denmark, p. 291, France, pp. 294 and 541-542, and Canada, p. 284, operates with the possibility to impose custodial sentences with respect to accidental pollution.

3.2 In relation to straits used for international navigation and the EEZ¹⁰⁰

3.2.1 Prescriptive jurisdiction

The Directive only applies to straits that are subject to the regime of transit passage,¹⁰¹ which according to UNCLOS are straits “... used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”¹⁰² The main provision regarding strait state prescriptive jurisdiction is article 42 (1) (b) providing that the strait state may prescribe in respect of “... the prevention, reduction and control of pollution, by giving effect to applicable international regulations ...”. In respect of pollution into the EEZ article 56 (b) (iii) of UNCLOS provides that a coastal state has jurisdiction “... with regard to the protection and preservation of the marine environment.” However, according to article 211 (5) the coastal state’s prescriptive jurisdiction is limited to conforming and giving effect to GAIRS.¹⁰³ Hence, the question is whether the Directive conforms and gives effect to AIRS in

¹⁰⁰ The Directive expressly states its intention to be applied in accordance with international law (art. 3) This is reaffirmed in respect of straits by article 3 (c) stating that the Directive only applies to discharges in straits “... subject to the regime of transit passage, as laid down in [UNCLOS], to the extent that a member State exercises jurisdiction over such straits.” Accordingly the Directive is quite clear in giving international law, UNCLOS in particular, priority in situations where the rules of the Directive regarding straits would be inconsistent with international law.

¹⁰¹ Directive 2005/35/EC art 3 (1) (c).

¹⁰² UNCLOS art. 37. Straits as described by art. 38 (1) are not subject to the regime of transit passage.

¹⁰³ According to Molenaar, (1998) pp. 363-364, the phrase ‘conforming and giving effect to’ implies that the coastal state’s prescription is limited to implement the GAIRS and that GAIRS represent both the maximum and minimum level of prescriptive jurisdiction, thus states can not apply GAIRS stricter or less stringent than provided by the GAIRS themselves. However, there are at least two arguments suggesting that the GAIRS only reflect a facultative maximum. First, the ‘all or nothing’ situation implied by the text is probably unintended. Second, the primary purpose of article 211 (5) —to ensure uniformity in international shipping— will not be affected as ships complying with GAIRS ‘...would presumably comply with less stringent rules and standards.’

accordance with UNCLOS article 42 (1) (b) and/or GAIRS in accordance with UNCLOS article 211 (5) in stating that any person,¹⁰⁴ except the owner, the master or the crew when certain conditions are met,¹⁰⁵ are susceptible to penalties for discharges of polluting substances into straits “... if committed with intent, recklessly or by serious negligence.”¹⁰⁶

This begs the question of the meaning of ‘applicable’ and ‘generally accepted’ and the relationship between these qualifications. The term ‘applicable’ denotes a specific set of rules, however, whether such rules and standards are applicable depends on each situation.¹⁰⁷ One should interpret ‘applicable’ in article 42 (1) (b) in light of article 39 (2) which requires foreign ships in transit passage to comply with GAIRS. Commenting on this Molenaar argues that “... it would seem logical that strait States would have prescriptive jurisdiction which mirrors the scope of these obligations for ships.”¹⁰⁸ This is in line with the ILA’s argument that “[w]here for example flag states [...] are required, and port and coastal states permitted, to exercise prescriptive jurisdiction with respect to GAIRS, it would be logical to presume that GAIRS are included within the term ‘applicable.’”¹⁰⁹ Thus, presupposing that the state enforcing the Directive and the flag state are both members of UNCLOS the coastal state is limited to conforming and giving effect to GAIRS.

With respect to the concept of GAIRS legal theory has been divided by three distinct points of view, but at present commentators seem to agree on an interpretation of ‘generally

¹⁰⁴ Directive 2005/35/EC art. 8 (2).

¹⁰⁵ Ibid. Art. 5 (2).

¹⁰⁶ Ibid. art. 4.

¹⁰⁷ Ibid. p. 116. Note that ‘AIRS’ is usually used in respect of enforcement jurisdiction while ‘GAIRS’ is usually used in respect of prescriptive jurisdiction. See Molenaar (1998) p. 291.

¹⁰⁸ Molenaar (1998) p. 291. See also Hakapää (1981) pp. 203-206 and *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 115 n. 213. Noyes, (2003) p. 203, concludes that ‘applicable’ means the same as ‘generally accepted’ when modifying ‘international rules and standards.’

¹⁰⁹ *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 116.

accepted,' as employed in UNCLOS,¹¹⁰ which they consider consistent with overall premise of UNCLOS.¹¹¹ According to these authors the state parties to UNCLOS have, through this convention, agreed to a lower requirement of acceptance than would be necessary if the GAIRS should refer to international customary law or IMO conventions.¹¹² This view encompasses three foundations in which international rules, standards or regulations are binding to parties of UNCLOS as long as they reflect UNCLOS's standards. Firstly, it is quite clear that some international agreements constitute GAIRS, for example the standards set out in MARPOL.¹¹³ Secondly, GAIRS can reflect customary law or even, as a third foundation, reflect state practice that has yet to mature into customary law.

The ILA Committee concludes that the concept of 'generally accepted' means that the flag state of the ship to which the GAIRS is applied does not have to accept the rules and standards. A rule or standard should be considered 'generally accepted' if sufficient state practice supports it.¹¹⁴ Regarding the required level of acceptance the Committee argues that it is sufficient that the rule or standard in question is supported by state practice if the legal instrument providing it should lack sufficient support.¹¹⁵

¹¹⁰ Arts. 21(2), 21(4), 39(2), 41(3), 53(8), 60(3), 60(5), 60(6), 94(2)(a), 94(5), 211(2), 211(5), 211(6)(c) and 226(1)(a).

¹¹¹ Noyes (2003) p. 203; The ILA committee, *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 107, argues that the third view is in line with the ultimate objective of UNCLOS part XII, which is "... to make compulsory for all states certain rules which had not taken the form of an international convention in force for the states concerned, but which were nevertheless respected by most states."

¹¹² According to the ILA Committee, *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 113, this view is represented by Vignes (1979) p. 716; Oxman (1991) pp. 109-159; Sohn (1986) pp. 1074-1075 and (1998) p. 295; Wolfrum (1999) pp. 231-232.

¹¹³ The ILA committee, *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 113, observes that MARPOL is considered, by some authors, to undoubtedly constitute the GAIRS employed in article 211 of UNCLOS. See also Noyes (2003) p. 203.

¹¹⁴ *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p.112.

¹¹⁵ Ibid.

As it is hard to find evidence of sufficient state practice to argue that the Directive can be considered GAIRS this examination seems to support the claimant's view in the *INTERTANKO and others v The Secretary of State for Transport* case. By referring to rules generated at the international level UNCLOS leaves no room for unilateralism¹¹⁶ and one must therefore rely on GAIRS/MARPOL's provisions. Accordingly, if one assumes that MARPOL deals with the persons that can be held liable and this is considered GAIRS, the Directive would not be conforming and giving effect to GAIRS. Thus, the claim that article 5 (2) represents an unlawful deviation from MARPOL in respect of the pollution into straits and the EEZ would be justifiable. However, as examined in section 3.1.1, the fact that the article 5 (2) of Directive represents a decision of who may be held liable it should rather be considered as a consequence of MARPOL being silent on the issue and a necessary step in order to apply MARPOL successfully, and not as unlawful unilateralism.

3.2.2 Enforcement jurisdiction

Regarding the coastal state's enforcement jurisdiction one must distinguish between straits and the EEZ. UNCLOS article 233 contains the main provision dealing with strait state enforcement jurisdiction allowing strait state enforcement only when a foreign ship is "... causing or threatening major damage to the marine environment of the straits."¹¹⁷ However, in respect of ships in transit passage the Directive only calls for enforcement in port and does not interfere with transit passage at all.¹¹⁸

¹¹⁶ Hakapää (1981) pp. 205 and 242; Abecassis and Jarashow (1985) pp. 106 and 110; Molenaar (1998) pp. 290 and 363.

¹¹⁷ UNCLOS art. 233. Molenaar, (1998) p. 295, points out that in many cases where enforcement action is allowed pursuant to article 233 the coastal state would also have a right of intervention as provided by article 221. See also Hakapää (1981) pp. 205-206.

¹¹⁸ Directive 2005/35/EC art. 6 (1) (a) and (b). Art. 7, which allows for more drastical enforcement measures, only applies infringements committed in the EEZ committed by ships navigating the territorial sea or the EEZ at the time of enforcement.

In respect of coastal state enforcement jurisdiction over vessel-source pollution in the EEZ UNCLOS article 220 (3, 5, and 6) provides such competence over foreign vessels navigating in the EEZ and territorial sea.¹¹⁹ Article 220 (3, 5, and 6) requires the coastal state to obtain certain qualities of evidence relating to the magnitude of the damage in order to exercise the enforcement actions described in paragraphs (3, 5, and 6) against a foreign vessel that is navigating in the EEZ or territorial sea¹²⁰ and has, in the EEZ, committed a violation of international or national "... rules and standards for the prevention, reduction and control of pollution from vessels...". In paragraphs (3) and (5) the level of certainty is set at 'clear grounds for believing,' while paragraph (6) requires 'clear objective evidence.' The Directive does not take avail of the enforcement measures available under paragraphs (3) and (5)¹²¹ as article 6 and 7 only allows for enforcement measures to be taken at sea in situations as described in UNCLOS article 220 (6). In all other situations, including those laid down in UNCLOS article 220 (3) and (5), the Directive calls for enforcement while the ship is in port.¹²²

Thus, the Directive seems to be more restrictive regarding enforcement measures available to the coastal state compared to UNCLOS. On the other hand, one could argue that the Directive is inconsistent with UNCLOS observing that article 7 (2) of the Directive refers to 'infringement.' As, *inter alia*, acts of pollution committed with serious negligence are

¹¹⁹ Article 220 (3, 5, and 6) has a *lex specialis* status in relation to article 73. See e.g. Kwiatkowska (1989) p. 181; Molenaar (1998) p. 382; *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 94.

¹²⁰ The phrase "a vessel navigating in the exclusive economic zone or the territorial sea" appears in all three paragraphs (article 220 (3), (5), and (6)). See also Molenaar (1998) p. 383.

¹²¹ The Directive only operates with two qualities of evidence (Art. 7 (1) (a) and (b) operates with 'suspicion' while art. 7 (2) operates with 'clear, objective evidence') and two levels regarding the magnitude of the damage (art. 7 (2) operates with damage that causes or threatens to cause major damage. Art. 7 (1) (a) and (b) does not specifically mention the seriousness of the damage and deals with damage not amounting to the level set in art 7 (2)).

¹²² Directive 2005/35/EC arts. 6 and 7. UNCLOS art. 220 (1) stipulates that, in respect of offences committed in the territorial sea or the EEZ, the "... State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution ...".

considered infringements by article 4, and article 7 (2) does not specify ‘infringement’, one must assume that article 7 (2) applies to all infringements as described in article 4. In contrast, article 220 (6) of UNCLOS specifies ‘violation’ by referring to paragraph (3), which provides that ‘violation’ is to commit “... a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that state conforming and giving effect to such rules and standards.”

Hence, the text of article 7 (2) of the Directive deviates from UNCLOS article 220 (6) in at least one significant aspect as 7 (2) applies to infringements of the Directive in general, while article 220 (6) refers to article 220 (3) which refers to AIRS. However, as concluded in subsection 3.1.2, article 4 of the Directive does not deviate from MARPOL and, as a consequence the reference to infringement in article 7 (2) is consistent with UNCLOS article 220 (6 and 3).

3.3 In relation to the high seas

As examined in subsection 3.2 the UNCLOS provisions dealing with coastal state jurisdiction over straits and the EEZ restricts prescription and enforcement to conforming to and giving effect to GAIRS. But in respect of the high seas UNCLOS operates with the principle of freedom of the high seas.¹²³

The freedom of the high seas is recognized in UNCLOS article 87 and only limited by article 92 (1) providing that the flag state enjoys exclusive jurisdiction over its vessels on

¹²³ In the *Lotus* case, (1927) p. 25, the Permanent Court of International Justice provided that vessels on the high seas are only subject to the authority of its flag state. Furthermore, the PCIJ stated that “[i]n virtue of the principle of the freedom of the seas, that is to say, in the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.” This general principle was affirmed in the 1958 Convention of the High Seas and reaffirmed by UNCLOS. See Brownlie (2003) pp. 238-239.

the high seas except “... in exceptional cases expressly provided in international treaties or in this Convention.”¹²⁴

However, the Directive only requires its members to enforce the Directive in cases of infringements committed on the high seas where the vessel responsible for the infringement is voluntary within a port.¹²⁵ According to UNCLOS article 218¹²⁶ a port state is allowed to take enforcement measures in respect of vessels violating AIRS, in this case MARPOL,¹²⁷ on the high seas.¹²⁸ The extent of the port state authority under article 218 is questionable as it seems to only deal with enforcement jurisdiction.¹²⁹ One recognized view is that port state enforcement jurisdiction presupposes prescriptive jurisdiction and that the very existence of article 218 means that the port state also has prescriptive jurisdiction.¹³⁰ However, this view is quite controversial. Bodansky argues that, according to this interpretation, “... article 218 creates a type of universal jurisdiction...” which is inconsistent with UNCLOS’s provisions on port state prescriptive jurisdiction.¹³¹ Bodansky suggests that article 218 should be interpreted as to limit port state enforcement jurisdiction to discharges on the high seas that violates AIRS “... that, by their own terms, apply to the vessel in question.”¹³² Thus, the port state would only have authority to take enforcement

¹²⁴ The most notable exceptions are arts. 211 (cases of major casualties involving major environmental damage) and 218 (see below). Other exceptions include arts. 99 (slave-trade), 100 (piracy), 109 (unauthorized broadcasting), 111 (the right of hot pursuit).

¹²⁵ Directive 2005/35/EC art. 6 (1) (a) and (b).

¹²⁶ For an overview on state practice on article 218 see Molenaar (1998) pp. 109-110.

¹²⁷ See subsection 3.2.1.

¹²⁸ According to UNCLOS article 92 (1) the provisions of UNCLOS itself may constitute exceptions to the exclusive flag state jurisdiction. Hence, indicating that UNCLOS part XII should be taken into account. See Abecassis and Jarashow (1985) p. 112.

¹²⁹ Article 218 is in Part II Section 6 of UNCLOS which deals with enforcement.

¹³⁰ Bodansky (1991) p. 762 n. 219; McDorman (1997) p. 315.

¹³¹ Bodansky (1991) p. 762. The articles dealing with port state prescriptive jurisdiction are 25 (2) and 211 (3) and only deals with conditions of entry into port.

¹³² Ibid.

measures against vessels violating MARPOL provisions if the vessel's flag state is party to MARPOL¹³³ and the level of prescription is limited to conform to MARPOL provisions.¹³⁴

Based on this interpretation the Directive seems invalid as it applies to any ship, irrespective of its flag.¹³⁵ Nevertheless, there are arguments suggesting that article 3 (2) should be interpreted narrowly and that the phrase 'any ship' should be interpreted as meaning 'any ship flying the flag of, or subject to the authority of a states party to MARPOL.' First, the Directive expressly states that it shall apply in accordance with international law.¹³⁶ Second, the acceptance of MARPOL is widespread and covers 97, 98% of the world tonnage¹³⁷ which makes the "... debate over the applicable international discharge rules [...] more theoretical than real...".¹³⁸ Third, it is possible that all state members of UNCLOS has through ratification of UNCLOS accepted "... rights and obligations with regard to GAIRS ...".¹³⁹ Based on this view MARPOL would be covered by 'applicable.' Fourth, one should take into account that some authors are of the opinion that "... there are strong grounds for treating the MARPOL Convention as a customary standard to be complied with by the vessels of all states, whether or not they have chosen to ratify."¹⁴⁰ Assuming the latter there would be no practical need for a narrow interpretation of the phrase 'any ship irrespective of flag' as all ships would be subject to MARPOL. The

¹³³ Ibid. P. 763. McDorman, (1997) pp. 319-320, supports this view.

¹³⁴ MARPOL is the only multilateral treaty establishing international discharge standards for vessels. See McDorman (1997) p. 316. This shows that the view that enforcement jurisdiction presupposes some kind of prescriptive jurisdiction is not necessarily correct. In case of article 218 the port state seems to have no prescriptive jurisdiction unless it is party to MARPOL. On the other hand some authors, Birnie and Boyle (1993) p. 267, suggests that MARPOL is a "... customary standard to be complied with by the vessels of all states, whether or not they have chosen to ratify."

¹³⁵ Directive 2005/35/EC art. 3 (2).

¹³⁶ Ibid. Art. 3 (1).

¹³⁷ By 31 December 2005. See <http://www.imo.org/Conventions/mainframe.asp?topic_id=247>

¹³⁸ McDorman (1997) p. 316.

¹³⁹ *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 116.

¹⁴⁰ Birnie and Boyle (1993) p. 267.

Claimants in the *INTERTANKO and others v. The Secretary of State for Transport* Case seem to be of this opinion.¹⁴¹

Hence, it is primarily the flag state's responsibility to enforce violations of MARPOL provisions on the high seas, but in respect of the abovementioned situation the port state is allowed to prescribe and take certain enforcement measures. It seems unlikely that the Directive is in breach of UNCLOS when stating that the "... Directive shall apply [...] to discharges of polluting substances in [...] the high seas"¹⁴² and that discharges "... of polluting substances into [the high seas] shall not be regarded as an infringement for the owner, the master or the crew when acting under the master's responsibility if it satisfies the conditions set out in ..."¹⁴³ MARPOL's 'damage exception.'

However, if one does not accept that 'applicable' includes MARPOL or that MARPOL is a customary standard that binds non-signatories the discussion above suggests that article 3 (2) should be interpreted narrowly.

4 Examination of main questions 2 and 3

Main questions 2 and 3 are interdependent as both questions deal with the Directive with respect to the territorial sea. As will be explained below Main question 2 deals with article 4 and 5 (2) of the Directive in connection with MARPOL, while main question 3 deals with article 4 of Directive in connection with the regime of innocent passage as laid down in UNCLOS. As UNCLOS contain the overarching principles concerning these issues the following examination deals with main question 3 before dealing with main question 2.

¹⁴¹ *INTERTANKO and others v. The Secretary of State for Transport* para. 36.

¹⁴² Directive 2005/35/EC art. 3 (1) (e).

¹⁴³ *Ibid.* Art. 5 (2).

4.1 Examination of main question 3

Article 4 of the Directive applies to any ship, irrespective of its flag,¹⁴⁴ discharging polluting substances into the internal waters and territorial sea of a member state as well as straits, the EEZ, and the high seas.¹⁴⁵ Accordingly, the provision applies to ships exercising their right of innocent passage through the territorial sea as well as others.

The shipping industry and others claim that article 4 of the Directive deviates from both MARPOL and UNCLOS by providing that seriously negligent acts of pollution shall be regarded as infringements. They argue that there is no basis in these conventions for such a deviation, and that the discrepancy is inconsistent with the regime of innocent passage as laid down in UNCLOS. Thus, a state member of the EU would be in breach of its obligations under UNCLOS.¹⁴⁶

In order to assess this claim one must examine the nature and extent of coastal state jurisdiction in relation to the right of innocent passage. However, the primary question is whether or not this kind of legislation brings forth the question of innocent passage at all.

¹⁴⁴ According to the Directive art. 3 (2) the following ships are excepted: “any warship, naval auxiliary or other ship owned or operated by a state and used, for the time being, only on government non-commercial service.”

¹⁴⁵ Directive 2005/35/EC arts. 3 and 4.

¹⁴⁶ *INTERTANKO and Others v. The Secretary of State for Transport*, paras 48 to 51.

4.1.1 Do the alleged discrepancies between the Directive and MARPOL/UNCLOS raise the question of innocent passage?

Ships of all states enjoy the right of innocent passage¹⁴⁷ “...through the territorial sea for the purpose of:

- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
- (b) proceeding to or from internal waters or a call at such roadstead or port facility.”¹⁴⁸

As long as the ship is in innocent passage the coastal state shall not “... impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage.”¹⁴⁹ Thus, innocent passage as described in article 18 shall not be hampered by the existence of national legislation or the enforcement of national legislation except in accordance with UNCLOS.¹⁵⁰

Article 19 (2) identifies several activities that a foreign ship must refrain from engaging in in order to retain its right of innocent passage.¹⁵¹ One such activity is wilful and serious acts of pollution in the territorial sea contrary to the Convention.¹⁵² Accordingly, the regime of innocent passage provides a right of unhampered passage through the territorial

¹⁴⁷ UNCLOS art. 17.

¹⁴⁸ Ibid. Art. 18 (1) (a) and (b).

¹⁴⁹ Ibid. Art. 24 (1) (a).

¹⁵⁰ Ibid. Art. 24 (1). This is reaffirmed by article 211 (4) with respect to prescriptive jurisdiction. See also Hakapää and Molenaar (1998) p. 334; Molenaar (1998) p. 201; Johnson (2004) pp. 79-80.

¹⁵¹ The most plausible interpretation of article 19 (2) seems to be that the list in article 19 (2) is limited to activities but that the list of activities is non-exhaustive. See Abecassis and Jarashow (1985) pp. 103-104; Ringbom (1996) p. 18; Hakapää and Molenaar (1998) p. 335; *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 57. State practice supports the latter view to some extent. See Molenaar (1998) p. 235.

¹⁵² Ibid. Art 19 (2) (h).

sea for all ships¹⁵³ as long as the passage is innocent. In respect of acts of pollution only a case of wilful and serious pollution can render passage non-innocent and deprive the ship of its right to pass through the territorial sea unhampered.

Mensah seems to interpret the criterion ‘wilful and serious’ in article 19 (2) (h) both as a requirement for depriving a ship of its right of innocent passage and as a requirement of guilt that must be met in order for coastal states to lawfully penalize the offender.¹⁵⁴ The latter view is quite unusual and difficult to find support for. First, as examined above the provisions, context, and purpose of the regime of innocent passage clearly provides that the criterion ‘wilful and serious’ only is relevant in respect of the very right of innocent passage and thus irrelevant in cases where a vessel is in innocent passage but violates coastal state legislation. In addition article 230 provides that a coastal state can impose no other than monetary penalties for violations of national legislation. Only in cases of wilful and serious acts of pollution may the coastal state opt to other measures. This involves recognition of the right for coastal states to impose monetary penalties for other than wilful and serious pollution. Consequently, article 230 (2) presupposes that criminalizing other than wilful and serious pollution is consistent with the regime of innocent passage. In addition there seems to be quite widespread state practice for criminalizing accidental pollution supporting this conclusion.¹⁵⁵ Furthermore, the view that UNCLOS only allows for criminalizing ‘wilful and serious’ acts of pollution is incompatible with the view that MARPOL sets the threshold at “... intent to cause damage, or recklessly and with knowledge that damage would probably result ...”.¹⁵⁶ Such an interpretation would

¹⁵³ There are specific rules for submarines in UNCLOS article 20 and warships and other government ships operated for non-commercial purposes in UNCLOS articles 29-32.

¹⁵⁴ Mensah (2005) p. 29.

¹⁵⁵ Gold (2006) pp. 270 and 273-336. See also Barrett and Grasso, (2004) p 154-157, for a list of cases. The F/V Hogifossur case in Canada and the Mimi Selmer case in Germany are examples of criminal charges for non-intentional offences.

¹⁵⁶ MARPOL I/11 (b) (ii) and II/6 (b) (ii).

ultimately bring MARPOL and UNCLOS in disharmony as MARPOL is intended to apply to both intentional and accidental discharges.¹⁵⁷

Specifically related to the Directive, Mensah submits that the Directive adopts a lower threshold of liability than MARPOL and UNCLOS “... whose effect is to hamper innocent passage of a foreign vessel through the territorial sea.”¹⁵⁸ However, article 4 of the Directive only provides that intentional, reckless or seriously negligent acts of pollution shall be regarded as infringements of the Directive and not that foreign ships engaging in acts of intentional, reckless or seriously negligent acts of pollution will lose their right of innocent passage. On the contrary, the Directive expressly states that the application of the provisions contained shall not prejudice the provisions of UNCLOS or other applicable international law implying that the very *right* of innocent passage does not cease to exist.¹⁵⁹ In addition, the Directive is more restrictive than UNCLOS in respect of enforcement measures available to the coastal state in cases of ships violating national legislation while still in innocent passage.¹⁶⁰

Consequently, one is presented with the conclusion that, according to the Directive, reckless or seriously negligent pollution in the territorial sea of an EU member state is regarded as an infringement of the Directive; however an infringement does not necessarily¹⁶¹ deprive a ship of its right of innocent passage.¹⁶² This feature is not unique

¹⁵⁷ See subsection 4.3 for an examination of this.

¹⁵⁸ Mensah (2005) p. 28.

¹⁵⁹ Directive 2005/35/EC art. 9.

¹⁶⁰ Compare article 7 of the Directive with article 220 (6) of UNCLOS. See subsection 4.1.3 for an elaboration.

¹⁶¹ The phrase ‘does not necessarily’ is intended to underline that, although article 4 does not deal with innocent passage, an act of ‘wilful and serious’ pollution would be considered an infringement of the Directive and as an activity depriving the ship of its right of innocent passage.

¹⁶² Subsection 4.1.3 shows that UNCLOS allows for greater interference with passage than the Directive without depriving the vessel of the right (of innocent passage). See also *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 88; Johnson (2004) p. 81.

to the Directive as most violations of national legislation are not serious enough to render passage non-innocent.¹⁶³ Moreover, this underlines that article 19 (2) (h) of UNCLOS and article 4 of the Directive serve different purposes and applies to different situations. Thus, Mensah's conclusion that the Directive hampers the right of innocent passage because it operates with test of criminality that does not correspond with the criterion in UNCLOS article 19 (2) (h) is unfounded. However, based on an alternative legal basis, the contention that article 4 of the Directive is inconsistent with the regime of innocent passage might contest the validity of the Directive. This will be examined in subsections 4.1.2 and 4.1.3 below.

4.1.2 Issues regarding prescriptive jurisdiction

The main provision regarding coastal state prescriptive jurisdiction in relation to innocent passage is UNCLOS article 21. Article 21 (1) (f) provides that the coastal state may enact legislation in respect of "... the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof" provided that the adopted legislation is in conformity with UNCLOS and other rules of international law. While article 19 covers 'wilful and serious' acts of pollution, a category which will render passage non-innocent, article 21 covers acts of pollution that does not meet these criteria.¹⁶⁴ Thus article 21 covers discharges that are; a threat of pollution, accidental, and or does not meet the criterion 'serious'.¹⁶⁵ However, UNCLOS provides important limits to this broad authorization.

¹⁶³ *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 87.

¹⁶⁴ Hakapää (1981) p. 190. According to Molenaar, (1998) p. 199 n. 17, Churchill and Lowe, (1988) pp. 79-80, argues that, although art 21 appears exhaustive, coastal states retain residual jurisdiction. This is based on the principle of coastal state sovereignty over territorial waters. On the other hand Roach and Smith, (1996) p. 233, submit that the list in art 21 (1) is "exhaustive and inclusive."

¹⁶⁵ Hakapää (1981) p. 190. In respect of the criterion 'serious' the Court in the *United States v. Royal Caribbean Cruises, Ltd* (D. P. R. 1997) case did not consider a wilful discharge of 30 gallons (113,59 litres) to be a serious act of pollution. Commenting on this Walker, (2004) p. 260, specifies that "... thirty gallons in one context might be 'serious,' but not so in another."

First, the coastal state is limited to give effect to GAIRS if the legislation applies to the design, construction, manning or equipment of foreign ships the coastal state is limited to giving effect to generally accepted international rules or standards.¹⁶⁶ However, the Directive does not deal with design, construction, manning or equipment and is therefore not limited by article 21 (2).¹⁶⁷

Second, articles 24 and 211 (4) limit the competence conferred by article 21 in that they provide that coastal state regulation of ship-source pollution in the territorial sea shall not hamper innocent passage. Article 211 (4) specifically mentions the marine environment opposed to article 21 which refers to “the environment of the coastal state.”¹⁶⁸ Hence, a textual interpretation of article 21 read in connection with article 211 leads to the conclusion that, in respect of the environment of the coastal state’s territorial sea in general, only the limits provided by article 21 applies.¹⁶⁹ But in respect of the marine environment of the territorial sea, as particularly referred to in 211 (4), the coastal state’s right to legislate is further limited by the proviso that “... such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.”¹⁷⁰ Article 24 specifies the term ‘hamper’ by stating that

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

¹⁶⁶ UNCLOS, art 21 (2).

¹⁶⁷ The wording of art. 21 implies that (1) (a-h) is an exhaustive list, but UNCLOS arts. 27 and 28 implies that other areas than those mentioned in art 21 is subject to coastal state regulation. This is in accordance with the general premise laid down in article 2 of UNCLOS concerning the legal status of the territorial sea.

¹⁶⁸ UNCLOS, art 21 (2) (h).

¹⁶⁹ According to Molenaar, Molenaar (1998) p. 200, this indicates that “... a coastal state’s competence goes beyond that of the marine environment, and includes amongst others the protection of the coastline.”

¹⁷⁰ UNCLOS, art 211 (4). See Nordquist, Rosenne, Yankov and Grandy (1991) p. 204.

(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage [.]

The wording of article 24 (and article 211 (4)) does not yield much guidance in determining to what extent coastal state jurisdiction is limited by the terms ‘hamper’ and ‘impair.’ However, the text of article 24 raises one important issue that need further examination.

However, article 24 provides that it is not strictly forbidden to hamper innocent passage as enactments imposing restrictions are legitimate as long as they are in accordance with UNCLOS.¹⁷¹ Articles 21, 22, and 23 provide coastal states with such legal foundation with article 21 (2) representing, as mentioned, the most significant exclusion from coastal state regulation. Considering that the convention only requires CDEM standards to meet this threshold (GAIRS), the impact of other rules and standards can arguably be quite significant. By analogy, articles 220 (2) and 25 (3) contribute to clarify the relationship between the coastal state’s right to legislate and the right of innocent passage.¹⁷² Pursuant to article 220 (2) a coastal state may, in accordance with its laws, institute proceedings and detain a ship navigating its territorial sea and pursuant to article 25 (3) a coastal state may temporarily suspend innocent passage of foreign ships if certain criteria are met. By prescribing such laws the coastal state could very well be considered to hamper the innocent passage of a ship, but if so, the enactments would hamper innocent passage *in accordance* with UNCLOS. Additionally, as mentioned in subsection 4.1.1, article 230 recognizes the right for coastal states to impose monetary penalties for other than wilful and serious pollution hence, presupposing that criminalizing other than wilful and serious pollution is consistent with the regime of innocent passage. Accordingly, the argument that monetary penalties against negligence as such is in breach of article 24 (2) contradicts the precondition underlying article 230.

¹⁷¹ See Johnson (2004) p. 80.

¹⁷² Ibid. See also Hakapää and Molenaar (1998) p. 341.

These arguments strongly suggests that the mere existence of the Directive can not be considered to hamper the right of innocent passage,¹⁷³ and it is evident that coastal state legislation can have a significant impact on navigation in the territorial sea without ‘hampering’ innocent passage contrary to UNCLOS.¹⁷⁴ This conclusion is in line with the overall premise of coastal state sovereignty over its territorial sea laid down in UNCLOS article 2 (1).

4.1.3 Enforcement issues

Neither Mensah nor the claimants in *INTERTANKO and others v. The Secretary of State for Transport* raises questions regarding the enforcement of article 4 of the Directive. Nevertheless there are relevant issues relating to the enforcement of the Directive that should be examined.

The extent of coastal state enforcement jurisdiction over vessel-source pollution in the territorial sea is laid down in article 220 (2) of UNCLOS, which provides that that a coastal state may undertake physical inspection and institute proceedings, including detention of the ship if the coastal state has obtained clear grounds for believing that the ship has committed an act of unlawful pollution in the territorial sea.¹⁷⁵

The Directive on the other hand calls for enforcement measures against a ship polluting the territorial sea to be taken only while the ship is in port.¹⁷⁶⁻¹⁷⁷ The Directive only provides

¹⁷³ See subsection 4.1.3 for examples from state practice supporting this.

¹⁷⁴ See also Johnson (2004) p. 80.

¹⁷⁵ Article 73 of UNCLOS also deals with enforcement issues but article 220 is clearly meant to be applied as a *lex specialis* to art 73. See Molenaar (1998) p. 382; *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 94. See also Kwiatkowska (1989) p. 181.

¹⁷⁶ This is also the case regarding pollution in straits used for international navigation subject to the regime of transit passage and the high seas. See Directive 2005/35/EC arts. 6 (1) and 7 (1) (a) and (b).

for enforcement at sea in one situation: If there are clear, objective evidence that a ship, navigating in the territorial sea or the EEZ has, in the EEZ, "... committed an infringement resulting in a discharge causing major damage or a threat of major damage"¹⁷⁸ the coastal state may institute proceedings, including detention of the ship.¹⁷⁹ If the level of evidence only supports 'suspicion' the coastal state must wait until the ship reaches its next port of call before enforcing the Directive.

As examined in subsection 3.2.2 article 7 (2) is an almost verbatim reproduction of UNCLOS article 220 (6). However, the provision deviates from UNCLOS article 220 (6) in at least one significant aspect as article 7 (2) applies to infringements of the Directive in general, while article 220 (6) deals with violations such as described in article 220 (3). However, subsection 3.1.2 and 3.2.2 show that article 4 of the Directive does not represent a deviation from MARPOL and it is sufficient for the purpose of this dissertation to assume that MARPOL is included in AIRS.

Assuming that MARPOL operates with recklessness as a test of criminality for accidental discharges one could argue that article 7 (2) of the Directive is inconsistent with UNCLOS article 220 (6). If a coastal state exercises enforcement measures, as provided by the Directive, against a ship navigating its territorial sea and that has committed a seriously negligent act of pollution to the EEZ, the coastal state avails itself of measures not available according to the GAIRS. Thus, the coastal state would be in breach of article 220 (6) and hamper innocent passage contrary to the Convention and violate article 24.¹⁸⁰ However, MARPOL does not operate with a standard of liability and does not prevent the

¹⁷⁷ Consequently, the restrictions of the competence laid down in UNCLOS art. 220 (2) (set by articles 24, 27, and 28. See Molenaar (1998) p. 244) will not be examined.

¹⁷⁸ Directive 2005/35/EC art. 7 (2).

¹⁷⁹ Even though article 7 (2) deals with pollution in the EEZ, the provision applies to ships navigating the territorial sea and can, as a consequence, have an impact on the right of innocent passage.

¹⁸⁰ Article 24 of UNCLOS applies to both prescriptive jurisdiction and enforcement jurisdiction. See Molenaar (1998) p. 201.

Directive from adopting one.¹⁸¹ Consequently, the Directive's reference to 'infringement' can not be considered inconsistent with UNCLOS article 220 (3 and 6) and the enforcement provisions of the Directive seem to be compatible with the regime of innocent passage.¹⁸²⁻¹⁸³

However, the coastal state must observe the obligation not to hamper innocent passage through the application of article 7 (2).¹⁸⁴ Pursuant to article 24 (2) (a) coastal state enforcement is not allowed to have the practical effect of denying or impairing the right of innocent passage. This presents the distinction between interference with passage and impingement of the very right of innocent passage.

In order to determine whether or not the right itself is 'denied' or 'impaired' one is, according to Molenaar, required to weigh the various interests involved in each case in light of the relevant factors.¹⁸⁵ A test of reasonableness, in which the principle of necessity,¹⁸⁶ the principle of proportionality,¹⁸⁷ the circumstances, the principle of good faith, and the obligation to avoid the abuse of right should be taken into account,¹⁸⁸ might play a decisive role.¹⁸⁹ The focus of the weighing would seemingly be on the

¹⁸¹ See subsection 3.1.2.

¹⁸² The Directive's intentions to be in accordance with international law are noteworthy. Articles 1 and 9 expressly states that the Directive shall be applied in accordance with applicable international law and the preamble para. 12 specifically calls for enforcement of 'article 7(2) infringements' in accordance with UNCLOS article 220.

¹⁸³ According to the Claimant's view on MARPOL and the standard of liability the conclusion would be the opposite. Surprisingly the Claimants do not argue that the enforcement of the Directive is inconsistent with the regime of innocent passage.

¹⁸⁴ UNCLOS art. 24.

¹⁸⁵ Molenaar (1998) p. 202.

¹⁸⁶ *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 88.

¹⁸⁷ *Ibid.* See also Abecassis and Jarashow (1985) p. 87.

¹⁸⁸ UNCLOS, art. 300.

¹⁸⁹ Hakapää (1981) p. 196; Molenaar (1998) pp. 201-202; *Vessel-Source Pollution and Coastal State Jurisdiction* (2001) p. 88.

determination of to what extent coastal state laws and regulations burdens navigation, and whether or not the enforcement has the practical effect of nullifying or extinguishing the right to innocent passage, or are too burdensome to be practical.¹⁹⁰ In this regard one could argue that the type and level of penalties has the practical effect of rendering passage through the territorial sea to burdensome to be practical, for example the imposition of exorbitant fines or disproportionate custodial penalties.¹⁹¹

According to Framework Decision 2005/667/JHA the overarching objective in respect of penalties is that they shall be effective, proportionate and dissuasive.¹⁹² The maximum level of fines against legal persons is set at "... a maximum of at least between EUR 150 000 and EUR 300 000 [and] of a maximum of at least between EUR 750 000 and EUR 1 500 000 in the most serious cases, including at least the intentionally committed offences covered by Article 4(4) and (5)."¹⁹³

State practice shed some light on this issue as several states have adopted regulatory systems that involve imposition of fines against intentional, and in some cases accidental, pollution. Several states operate with the possibility to impose fines which exceed the monetary level set out in the framework decision by a great margin.¹⁹⁴ As the maximum level of fines according to the framework decision is significantly lower than the maximum set by the national legislation of several states it seems reasonable to conclude that the level

¹⁹⁰ Johnson (2004) p. 81.

¹⁹¹ According to the Directive penalties other than fines and imprisonment are discretionary and will not be examined here. See framework decision 2005/667/JHA art. 4 (3) and 6 (1) (b).

¹⁹² Council Framework Decision 2005/667/JHA art. 5 (1).

¹⁹³ Ibid. Art. 6 (1) (a) (i and ii). In respect of natural persons the framework decision is silent leaving it to the discretion of national legislation.

¹⁹⁴ E.g. Spain: EUR 400 million, Gold (2006) p. 326; Ireland: EUR 12.7 million, p. 302; Australia: AUD 10 million for corporations within the jurisdiction of New South Wales; p. 276, Mexico: Approximately EUR 8.7 million p. 311; Romania: Approximately EUR 3.3 million p. 320; Portugal: EUR 2.5 million p. 319, pp. 282-284 and 539-540; Canada: CAD 1 million. However, new amendments provide for higher fines for both intentional and accidental discharges, p. 294 and pp. 541-542.

of fines adopted by the framework decision does not have the practical effect of rendering innocent passage impractical.

In addition to fines the framework decision requires its member states to impose criminal penalties of a maximum of at least one and ten years of imprisonment depending on the seriousness of the offence.¹⁹⁵ The Directive is not a unique enactment in this regard as several states have adopted a regulatory system that involves the possibility of imposing long term custodial sentences for pollution offences.¹⁹⁶ However, the Directive and the framework decision are clearly more progressive with respect to imprisonment than with respect to the monetary level of fines as it is on par with the most restrictive national regulatory systems. Notably, the maximum penalty is reserved for the most serious cases involving the death or serious injury of persons¹⁹⁷ and the maximum penalty for offences having such consequences is substantially lower.¹⁹⁸ Accordingly there is little support for the argument that the Directive and the framework decision operates with disproportionate custodial sentences which have the effect of rendering the right of innocent passage too burdensome to be practical.

Even though the Directive is consistent with the regime of innocent passage one could argue that the Directive and framework decision is inconsistent with article 230 of UNCLOS. According to the Directive's article 4 the provisions of the framework decision applies to infringements of the Directive, including those committed with serious negligence. The framework decision requires its members to impose custodial sentences for infringements of the Directive which is problematic when taking the safeguards in UNCLOS article 230 into account. Article 230 states that other non-monetary penalties can only be imposed with respect to wilful and serious acts of pollution. Consequently, the

¹⁹⁵ Framework Decision 2005/667/JHA art. 4. See the examination of this in section 6.

¹⁹⁶ E.g. France: 10 years, Gold (2006) pp. 294 and 541-542; Romania: 10 years, P. 320; Mexico: 9 years, p. 311; Portugal: 8 years, P. 319.

¹⁹⁷ Framework Decision 2005/667/JHA art. 4 (4).

¹⁹⁸ Ibid. art. 4 (5 and 6).

framework decision is inconsistent with UNCLOS when requiring coastal states to impose custodial sentences in respect of acts of pollution that are not wilful and serious.¹⁹⁹

However, as explained in subsection 3.1.3, article 4 (8) of the framework decision expressly states that article 4 shall be applied in conformity with UNCLOS article 230 with respect to custodial penalties. Thus, article 4 of the framework decision should therefore be interpreted narrowly with respect to custodial sentences.

4.2 Examination of main question 2

The second issue²⁰⁰ referred to the European Court of Justice by the English High Court of Justice²⁰¹ contains two questions that should be clarified in order to distinguish them sub-questions 2 (a) and 2 (b).

4.2.1 The distinction between questions 2 (a) and 2 (b)

Question 2 (a) deals with article 4 of the Directive which sets a standard of liability for infringements of the Directive. The claimants contend that article 4 is invalid in that it operates with serious negligence as a test of liability while MARPOL provides for a higher standard of liability in respect of accidental discharges. The question referred under 2 (b) deals with article 5 (1) of the Directive which excludes certain acts of pollution from article 4. According to article 5 (1) acts of pollution that satisfies the conditions set out in regulations 9, 10, 11 (a), or 11 (c) of annex I and 5, 6 (a) or 6 (c) of annex II, are excluded from article 4. The claimants argue that article 5 (1) is invalid as the application of MARPOL regulations I/11 (b) and II/6 (b) are excluded from the exceptions to article 4.

¹⁹⁹ See for example art. 4 (6) of Framework Decision 2005/667/JHA.

²⁰⁰ Whether the EU can lawfully legislate for the territorial sea otherwise than in accordance with MARPOL. See *INTERTANKO and others v. The Secretary of State for Transport*, paras. 35-46.

²⁰¹ *INTERTANKO and others v. The Secretary of State for Transport*.

One aspect of this interpretation is particularly interesting. The claimants view implies that the claimants regard MARPOL as operating with a standard of liability in respect of accidental pollution resulting from damage to the ship or its equipment, and in respect of accidental pollution in general. What seems to be the claimant's case then, is that the Directive, by excluding these regulations from article 5 (1), operates with intent, recklessness and serious negligence as a test of liability in respect of all ship-source discharges of polluting substances into the territorial sea,²⁰² irrespective of the discharge's cause, and any person²⁰³ can be held liable.²⁰⁴

Accordingly, both question 2 (a) and question 2 (b) apparently deal with the standard of liability as set out in the Directive in connection with MARPOL. It seems like the relevant distinction between the questions are that question 2 (a) deals with whether serious negligence as a test of liability is inconsistent with MARPOL in general, while question 2 (b) deals with whether serious negligence as a test of liability is inconsistent with

²⁰² The same applies to the internal waters. However, regulations I/11 (b) and II/6 (b) of MARPOL applies to the owner, master or crew when acting under the master's responsibility for discharges of polluting substances into straits used for international navigation, the EEZ, and the high seas. See article 5 (1) in connection with article 5 (2)

²⁰³ Article 8 of the Directive provides that "... effective, proportionate and dissuasive penalties ..." (art. 8 (1)) applies "... to any person who is found responsible for an infringement within the meaning of article 4 ..." (art 8 (2)). However, article 5 (2) provides that in respect of pollution into other areas than the internal waters or the territorial sea "... the owner, the master or the crew when acting under the master's responsibility..." are exonerated if the infringement "... satisfies the conditions set out in Annex I, Regulation 11 (b) or in Annex II, Regulation 6 (b) of MARPOL 73/78."

²⁰⁴ According to Mensah, (2005) p. 26, the question of who is liable "... may not be particularly significant [...] if the Directive is found to be defective in other more important areas." The question of who is liable is raised under the first question referred to the ECJ in the *INTERTANKO and others v. The Secretary of State for Transport* case, see section 6 for an elaboration. However, that question only relates to straits used for international navigation, the EEZ and the high seas, while questions 2 (a) and 2 (b) cover the discrepancy between the Directive and MARPOL in respect of the territorial sea, and the claimants do not raise the question of who is liable in this connection.

MARPOL in cases of damage to the ship or its equipment as laid down in regulations I/11 (b) and II/6 (b).

4.3 Question 2 (a)

In order to examine questions 2 (a) and 2 (b) separately the examination of question 2 (a) assumes that the ‘damage exception’ in MARPOL sets a standard of liability for accidental discharges resulting from damage to the ship or its equipment despite this assumption contradicting the conclusions above.²⁰⁵

Assuming that the ‘damage exception’ in MARPOL sets a standard of liability one can observe that the standard of liability adopted in article 4 of the Directive applies to all violations of its provisions, while MARPOL only operates with a standard of liability for violations of annex I and II in respect of damage to the ship or its equipment.²⁰⁶ In respect of violations of MARPOL discharge standards, that are not a result of damage, the Convention does not operate with a standard of liability. Notwithstanding the fact that MARPOL is silent in these situations, and that the standard of liability set out in regulations I/11 (b) (ii) and II/6 (b) (ii) comes into play regarding accidental pollution, the conclusion that MARPOL only is applicable to accidental pollution when the these conditions are met²⁰⁷ is not justified. On the contrary, article 2 (3) (a) states that the term ‘discharge’ means “... any release howsoever caused from a ship...” thereby including accidental discharges irrespective of whether the discharge is a result of damage to the ship or its equipment.²⁰⁸ In addition the recitals of MARPOL expressly provide that one of the

²⁰⁵ See subsection 3.1.2.

²⁰⁶ MARPOL Annex I, regulation 11 (b) and Annex II regulation 6 (b).

²⁰⁷ Mensah (2005) p. 27.

²⁰⁸ Hakapää, (1981) p. 97, argues that the term ‘any release howsoever’ in MARPOL art. 2 (3) (a) covers “... unintentional pollution resulting from casualties, spills during cargo handling and leakage.” Bodansky, (1991) pp. 728-729, specifies that, although discharges means both accidental and non-accidental discharges, “... discharge standards are generally directed at nonaccidental [sic], operational discharges such as routine tank

main objectives of MARPOL is to minimize accidental pollution.²⁰⁹ State practice also support this as several states have criminalized accidental violations of MARPOL.²¹⁰ Accordingly, when assuming that MARPOL sets a standard of liability, the discrepancy between the Directive and MARPOL would only be in respect of MARPOL violations resulting from damage to the ship or its equipment.

As MARPOL clearly applies to both accidental and intentional discharges, and has not adopted a standard of liability, the Directive seems to fill a regulatory gap in MARPOL rather than deviate from its rules in this respect. Consequently, article 4 of the Directive does not deviate from MARPOL in this respect.

4.4 Question 2 (b)

The Claimants argue that the Directive deviates from MARPOL in that it provides that wilful, reckless and seriously negligent acts of pollution in general, and irrespective of its cause, shall be treated as infringements.²¹¹ The ‘damage exception’ in MARPOL on the other hand, states that discharges resulting from damage to the ship or its equipment are excepted if the requirements set out in regulations I/9 and I/10 and II/5, unless “... the owner or the Master acted either with intent to cause damage, or recklessly and with

cleaning and ballasting operations, since accidents are nonpurposive [sic] and hence not amenable to direct regulation.” See also Timagenis (1980) pp. 365-366; Molenaar (1998) p. 63 n. 109; Christodoulou-Varotsi (2006) p. 379.

²⁰⁹ The recitals provide that the parties to the Convention desire “... to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances.”

²¹⁰ E.g. Canada, Gold (2006) p. 282; Denmark, p. 291; France, p. 294; Germany, p. 296; USA, pp. 369-381.

²¹¹ By reading article 3 (a and b) of the Directive in connection with article 5 (1-2) it is evident that the alleged discrepancy is caused by the Directive not recognizing the exceptions set out in MARPOL’s ‘damage exception in respect of pollution into the internal waters and territorial sea.

knowledge that damage would probably result”²¹² Thus, assuming that MARPOL operates with a standard of liability in cases where the discharge is a result of damage to the ship or its equipment, the Directive is more stringent than MARPOL. As shown in section 2.2.1 jurisdictional issues in connection with MARPOL are left to be decided within the UNCLOS framework and the Directive is not necessarily unlawful even if considered to deviate from MARPOL.²¹³

However, as concluded in subsection 3.1.2, MARPOL does not operate with a requirement of guilt that has to be met in order to impose criminal sanctions in accordance with MARPOL article 4. Accordingly article 5 (2) of the Directive is not in conflict with the ‘damage exception’ in MARPOL.

5 Conclusions

The claimant’s arguments concerning main questions 1 and 2 are based on the assumption that MARPOL provides a fixed, binding, and uniform set of rules implying that a coastal state cannot enact legislation that deviates from the parameters laid down in MARPOL.²¹⁴ Section 2.2.1 shows that MARPOL leaves jurisdictional issues, both with respect to prescription and enforcement, to be resolved within the framework of UNCLOS. Thus, state members to MARPOL retain residual jurisdiction under MARPOL and one must consider the jurisdictional interplay between MARPOL and UNCLOS in order to draw conclusions on whether national legislation can lawfully depart from MARPOL provisions.

²¹² Regulation I/11 (b) (ii) and II/6 (b) (ii).

²¹³ Mensah, (2005) p. 27, supports this conclusion.

²¹⁴ *INTERTANKO and others v. The Secretary of State for Transport*. See for example para. 29.

Further the claimants argue that the Directive is inconsistent with and contrary to MARPOL with respect to several issues concerning prescriptive jurisdiction.²¹⁵ Section 3.1 concludes that the Directive fills a regulatory gap in MARPOL with respect to the issue of who can be held liable and the issue of setting a standard of liability as MARPOL is silent on these issues. The determination of who can be held liable and the adoption of a standard of liability in national legislation should rather be considered necessary in order to successfully apply the Convention and in order to meet the requirement to prohibit violations of MARPOL.²¹⁶

While subsection 3.2.1 concludes that the Directive is in conformity with MARPOL and UNCLOS with respect to violations committed in straits and the EEZ, the conclusion regarding the high seas is less certain. As the Directive applies to ships flying the flag of non-signatories to MARPOL one can argue that the Directive is inconsistent with UNCLOS article 218. However, most arguments suggest that the Directive is compatible with UNCLOS with respect to offences committed on the high seas. If one draw the opposite conclusion one should rather interpret article 3 (2) narrowly than consider the Directive invalid as the possible discrepancy is marginal.

Concerning main question 3 the claimants rely on Mensah arguing that, even though enactments can depart from MARPOL standards, the standard of liability adopted in the Directive is incompatible with the regime of innocent passage.²¹⁷ However, this contention is based on an assumption that seems to be wrong as article 4 of the Directive does not deal with the right of innocent passage and the criterion ‘wilful and serious’ in UNCLOS article 19 (2) (h) does not restrict coastal states prescriptive jurisdiction with respect to adopting a test of criminality.

²¹⁵ See Ibid. Para. 17 and main questions 1, 2, and 3.

²¹⁶ MARPOL art. 4.

²¹⁷ INTERTANKO and others v. The Secretary of State for Transport paras. 49-50. Mensah (2005) p. 27.

With respect to main question 2 the claimants argue that articles 4 and 5 (2) of the Directive are invalid as it imposes sanctions for serious negligence and excludes certain persons from the ‘damage exception’ in MARPOL. Recalling the examinations in subsections 3.1.1 and 3.1.2 this line of argument is found to be based on unreasonable assumptions.

The abovementioned shows that the Directive should be considered valid with respect to the issues regarding prescriptive jurisdiction. However, sections 3 and 4 show that there are several issues concerning enforcement jurisdiction that should be discussed in relation to the main questions and that the claimants’ and Mensah’s somewhat one sided focus on prescriptive jurisdiction results in neglecting important enforcement issues.

The first observation regarding enforcement jurisdiction is that articles 6 and 7 of the Directive are generally more restrictive than UNCLOS. However, subsections 3.2.2 and 4.1.3 show that article 7 (2) of the Directive seemingly represents a noteworthy deviation from UNCLOS article 220, but this deviation is more textual than real and the authority provided by article 6 and 7 of the Directive is well within the limits laid down in article 220 of UNCLOS,

Second, subsection 3.1.3 shows that the enforcement of the Directive, with reference to the framework decision, in respect of offences committed in straits, the EEZ, or on the high seas is inconsistent with UNCLOS as article 230 expressly states that non-monetary penalties only may be imposed with respect to offences committed in the territorial sea. Furthermore, as examined in subsection 4.1.3, the Directive calls for the imposition of custodial sentences for serious negligence while article 230 of UNCLOS states that the coastal state may only resort to imprisonment in cases of wilful and serious pollution. Nevertheless, article 4 of the framework should be interpreted narrowly with respect to custodial penalties as article 4 (8) expressly states that article 4 shall apply without prejudice to article 230 of UNCLOS.

Third, subsection 4.1.3 shows that the Directive arguably hampers the right of innocent passage contrary to UNCLOS. However, the legal foundation for this line of argument is based on UNCLOS article 24 and not article 19 (2) (h). Nevertheless, the Directive does not hamper innocent passage contrary to UNCLOS and there are strong arguments suggesting that the Directive does not have the practical effect of impairing or denying the right of innocent passage.

Concerning the few situations where the Directive represents a deviation from UNCLOS the examinations in this paper suggest that the Directive should be interpreted narrowly thus bringing it in conformity with UNCLOS. Based on these conclusions the Directive is found to be consistent with both MARPOL and UNCLOS and the Directive should be considered valid.

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